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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. KHALED AMHAD, Defendant and Appellant.	E030246 (Super.Ct.No. FVA014751) O P I N I O N

APPEAL from the Superior Court of San Bernardino County. Louis O. Glazier, Judge. Affirmed.

Alex Mendoza, Jr. for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Gary W. Brozio, Supervising Deputy Attorney General, and Kelly A. Johnson, Deputy Attorney General, for Plaintiff and Respondent.

Defendant unsuccessfully challenges the trial court's denial of his motion to withdraw his guilty plea.

FACTUAL AND PROCEDURAL BACKGROUND

On February 8, 2001, defendant, who is not a citizen of the United States, was arrested after a San Bernardino County Sheriff's deputy found 280,000 tablets of pseudoephedrine in his car. A complaint charged him with two counts of possession of pseudoephedrine/ephedrine with intent to manufacture methamphetamine (Health & Saf. Code, § 11383, subd. (c)(1)). Pursuant to a plea agreement, he pled guilty to one count in exchange for the dismissal of the second count, a suspended mitigated two-year prison term and a three-year probation term.

Before the sentencing hearing, defendant retained new counsel and filed a motion to withdraw his plea on the grounds that he was pressured to accept the bargain without proper advice regarding immigration consequences. Attached to the motion were declarations by defendant and former counsel. Former counsel declared that after receiving a "now or never" offer, he unsuccessfully attempted to contact an immigration attorney to discuss the ramifications of defendant's plea. Defendant's declaration stated his former counsel advised him of the "now or never" offer and said if he did not accept it, he "was looking at years in the State Prison where [counsel] was sure that [defendant's] chances to remain in the country would be lost. [Counsel] told [defendant] that he was unable to contact [defendant's] immigration attorney to determine the exact consequences of a plea of guilty. But [counsel] told [defendant] that [he] could best fight for the right to stay in this country from County Jail." He would not have accepted the offer had he been advised he would be

removed and excluded from this country, which he considered his home. At the commencement of the hearing, defense counsel stated that defendant wanted to edit his declaration to indicate that his former counsel "had told him that he had contacted an immigration attorney . . . ." The court permitted defendant to change his declaration and denied the motion to withdraw his plea.

The court imposed the stipulated two-year low term, suspended execution of sentence and placed defendant on three years' probation.

DISCUSSION

On appeal, defendant contends the trial court abused its discretion in denying his motion to withdraw his guilty plea. In support of his contention, he argues he demonstrated good cause because counsel's failure to advise him of the particular immigration consequences of his plea constituted ineffective assistance of counsel, his plea was entered under duress due to the time pressures dictated by the prosecutor, and the trial court's oral advisement of the consequences differed from the plea form advisement. We affirm.

Guilty pleas and admissions may be withdrawn before judgment for good cause shown. (Pen. Code, § 1018; *People v. Superior Court (Giron)* (1974) 11 Cal.3d 793, 796.) Mistake, ignorance, fraud, duress or any other factor overcoming the exercise of free judgment is good cause, but must be shown by clear and convincing evidence. (*People v. Cruz* (1974) 12 Cal.3d 562, 566; *People v. Nance* (1991) 1 Cal.App.4th 1453.) A decision to deny a motion to withdraw a guilty plea rests in the sound discretion of the trial court and is final unless the defendant can show a clear abuse of that discretion. (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1254.)

Defendant argues the trial court should have granted his motion to withdraw his guilty plea because it was entered under duress. Under the "now or never" offer, he was "hurried" into making the plea without being fully aware of the exact immigration consequences. We are not persuaded. "The law does not require that an offer to plead be held open for any specified period of time; it need only be held open for a reasonable period of time, upon request therefor." (*People v. Watts* (1977) 67 Cal.App.3d 173, 183.) Nothing in the record before us indicates defendant was under any more or less pressure than other defendants faced with serious felony charges and an offer of a plea bargain. (See *People v. Huricks* (1995) 32 Cal.App.4th 1201, 1208.) Defendant assured the trial court that he had enough time to go over all of the matters thoroughly and completely with his attorney and that he had no questions. Instead of informing the trial court that he felt "pressured," he assured the court that no one used any type of force, violence, threats, menace, duress, or undue influence on him or anyone closely associated with him to get him to plead guilty.

Furthermore, defendant was advised under Penal Code section 1016.5[1] of the three immigration consequences: deportation, exclusion from admission and denial of naturalization. In the exact language of the statute, his plea form advised the consequences

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[1]Penal Code section 1016.5, in pertinent part, provides: "(a) Prior to acceptance of a plea of guilty or nolo contendere to any offense punishable as a crime under state law, . . . the court shall administer the following advisement on the record to the defendant: [¶] If you are not a citizen, you are hereby advised that conviction of the offense for which you have been charged *may* have the consequences of deportation, exclusion from admission to the United States, or denial of naturalization pursuant to the laws of the United States." (Italics added.)

were a possibility, while the court stated the consequences "would result" from a conviction. Defendant's argument that this difference invalidates his plea because it created an ambiguity is not persuasive. "The rule that a plea must be intelligently made to be valid does not require that a plea be vulnerable to later attack if the defendant did not correctly assess every relevant factor entering his decision." (*People v. Knight* (1987) 194 Cal.App.3d 337, 344.) As indicated above, the record reveals defendant assured the court he had no questions and he entered his plea after the court explicitly warned him of the worst--that the consequences would follow his plea.

Finally, defendant argues his motion to withdraw his plea should have been granted because he received ineffective assistance of counsel when his attorney failed to advise him of the particular immigration consequences of his plea.

"Plea bargaining and pleading are critical stages in the criminal process at which a defendant is entitled, under both the Sixth Amendment to the federal Constitution and article I, section 15 of the California Constitution, to the effective assistance of legal counsel. [Citations.] 'It is well settled that where ineffective assistance of counsel results in the defendant's decision to plead guilty, the defendant has suffered a constitutional violation giving rise to a claim for relief from the guilty plea.' [Citations.]

"To establish ineffective assistance of counsel under either the federal or state guarantee, a defendant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that counsel's deficient performance was prejudicial, i.e., that a reasonable probability exists that, but for

counsel's failings, the result would have been more favorable to the defendant. [Citations.]" (*In re Resendiz* (2001) 25 Cal.4th 230, 239, fn. omitted.)

Here, the attorney who represented defendant at the plea hearing stated he unsuccessfully attempted to consult with an immigration attorney regarding the exact immigration ramifications of the plea. Defendant's declaration stated he was advised to accept the plea bargain because his "chances to remain in the country would be lost" if he went to state prison and he "could best fight for the right to stay in this country from County Jail." "'[T]he clear consensus is that an affirmative misstatement regarding deportation may constitute ineffective assistance.' [Citation] [¶] . . . Controlled substance violations 'are the most damning convictions in the Immigration and Nationality Act. There are very few situations where a plea to a narcotics violation would not have a fatal and permanent immigration consequence' as an 'alien convicted of a crime "relating to" controlled substances is deportable and excludable.' [Citation.]" (*In re Resendiz*, *supra*, 25 Cal.4th 230, 251-252, fn. omitted.) To the extent defendant was misadvised by his attorney, this error was not cured by the trial court's advisement under Penal Code section 1016.5. Defendant was entitled to rely on his attorney's independent evaluation of the possible consequences of conviction. (*In re Resendiz, supra,* 25 Cal.4th 230, 240-241.)

Assuming, arguendo, defendant has satisfied the performance prong of his ineffective assistance claim, he cannot prevail because he has not demonstrated prejudice. A defendant who pled guilty demonstrates prejudice caused by counsel's incompetent performance in advising him to enter the plea by establishing that a reasonable probability

exists that, but for counsel's incompetence, he would not have pled guilty and would have insisted on proceeding to trial. (*In re Resendiz, supra,* 25 Cal.4th 230, 253.)

Defendant claims that, if counsel had informed him he would be deported as a consequence of his guilty plea, he would not have pled guilty. As the Supreme Court has recognized, a noncitizen defendant with family residing legally in the United States understandably may view immigration consequences as the only one that could affect his calculations regarding the advisability of pleading guilty to criminal charges. (*People v. Superior Court (Zamudio)* (2000) 23 Cal.4th 183, 206-207.) However, defendant's assertion he would not have pled guilty if given competent advice "'must be corroborated independently by objective evidence.'" (*In re Resendiz, supra,* 25 Cal.4th 230, 253, quoting *In re Alvernaz* (1992) 2 Cal.4th 924, 938.) The record before us fails to disclose any.

"'In determining whether a defendant, with effective assistance, would have accepted [or rejected a plea] offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain.'" (*In re Resendiz, supra,* 25 Cal.4th 230, 253, quoting *In re Alvernaz, supra,* 2 Cal.4th 924, 938.)

Defendant has not argued that his counsel inaccurately communicated the plea offer. Nor has he adduced any substantial evidence suggesting the prosecutor might ultimately have agreed to a plea that would have allowed him to avoid adverse immigration

consequences. While the prosecution did not introduce evidence in this regard, the burden remains defendant's to prove by a preponderance of the evidence his entitlement to relief. (*In re Resendiz, supra,* 25 Cal.4th 230, 254.) He was charged with two counts of a drug-related offense (Health & Saf. Code, § 11383, subd. (c)(1)) after officers found 280,000 tablets of ephedrine in the car he was driving when it was stopped for a traffic violation. He faced a lengthy prison term; but, as a consequence of his plea bargain, he received a suspended two-year lower term and a three-year probation term with only 270 days of local custody. He has not claimed innocence or offered evidence to show how he might have been able to avoid conviction or what specific defenses might have been available to him at trial. Finally, the choice that defendant would have faced at the time he was considering whether to plead would *not* have been between pleading guilty and being deported, on the one hand, and, on the other, going to trial and avoiding deportation. By insisting on trial, defendant would for a period have retained a theoretical possibility of evading the conviction that made him deportable and excludable, but a conviction following trial would have subjected him to the same immigration consequences.

Based on our examination of the entire record, we are not persuaded that it is reasonably probable defendant would have forgone the distinctly favorable outcome he obtained by pleading guilty and insisted, instead, on proceeding to trial, had he been fully advised about the immigration consequences of pleading guilty. (See *In re Resendiz, supra,* 25 Cal.4th 230, 253.)

In view of the foregoing, we conclude the trial court did not abuse its discretion when it denied defendant's motion to withdraw his guilty plea.

DISPOSITION

The judgment is affirmed.

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HOLLENHORST
Acting P. J.

We concur:

RICHLI
J.

GAUT
J.